

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1402

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

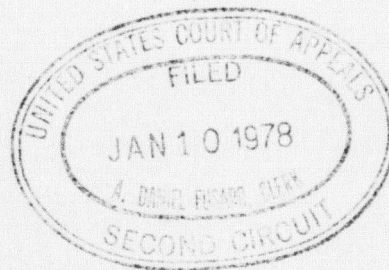
ROSE SMITH,

Appellant.

*On Appeal From The United States District Court
For The Southern District Of New York*

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

This is an appeal from a Judgment of Conviction entered on August 31, 1977 convicting appellant, Rose Smith, of a conspiracy to distribute and possess with intent to distribute a controlled substance: to wit heroin.

Appellant was convicted after a jury trial before Hon. Charles S. Haight, Jr. and sentenced to imprisonment for a maximum of five years; and six years special parole. Appellant was acquitted of a substantive count, charging possession with intent to distribute heroin.

STATEMENT OF FACTS

The Government's case was based primarily upon the testimony of Yolanda Valdez Simpson, an admitted conspirator.

The indictment contained two counts: "Count 1, is the conspiracy count ...they conspired to possess with intent to distribute heroin ... Count 2 ... charges these three defendants and others with possessing with intent to distribute approximately 2000 glassine envelopes of heroin." (Prosecutor's opening transcript, page 22).

Yolanda Valdez Simpson met Marion Knuckles in the summer of 1975 and processed and bagged a white powder for a fee. She did the same thing in the middle of 1976 prior to the period charged in the indictment.

In August 1976, Brown, Smith, Knuckles and Simpson met and packaged a white powder (T.pg. 76). In September the bagging of the white powder was done again. (T. pg. 98) Approximately 2000 glassine envelopes were filled and re-filled with white powder and bonita, in (T. pg. 111-115) October, 1976.

Simpson could not tell the difference between bonita and heroin or quinine (T. pg. 246) and no laboratory report or heroin was introduced in evidence.

Simpson testified that while packaging heroin the participants snorted cocaine which they had brought to the apartment (T. pg. 256). A spoon and strainer were introduced with a laboratory report (T. pg. 252, 259) indicating cocaine present.

DEA Agent Brophy testified to his search which revealed the strainer and spoon and took a confession from Rose Smith.

Warren Sims supplied damaging background testimony that did not mention Rose Smith. Betty McFarland, a narcotic seller testified to a separate earlier conspiracym not involving Rose Smith.

Robert Simpson, the husband of Yolanda, saw the storage bags alleged to contain narcotics, but did not see any drugs (T. pg. 702).

A motion for a mistrial (T. pg. 1105) was preceeded by the Court's decision on the question of a variance (T. pg. 969-970) between the indictment (heroin) and the proof (cocaine). Thereafter the Court, over objection, charged the jury that heroin or cocaine would suffice to prove the defedant's guilt.

Rose Smith was acquitted of the substantive count and convicted of the conspiracy sentence was imposed; a maximum

of five years imprisonment followed by six years special parole.

QUESTIONS PRESENTED

1. Did the Trial Court amend the indictment?
2. Can a heroin charge be supported by evidence of heroin or cocaine?

POINT ONE

THE COURT IMPROPERLY PERMITTED THE
DEFENDANT TO BE CONVICTED OF A
CRIME NOT CHARGED IN THE INDICTMENT.

The Grand Jury indictment, based presumably upon a presentation of some evidence, charged Rose Smith with a violation of the Federal Narcotic Drug Laws. Painting with broad strokes the charge was written as a schedule I or II substance. The United States attorney's opening statement, however, directed the jury's attention to heroin and only heroin.

At trial the evidence was introduced to prove a conspiracy and substantive count regarding heroin. Almost as an after thought Yolanda Simpson mentioned cocaine (T.pg.254-256).

Most importantly, Yolanda Simpson said that the people brought cocaine to snort. They did not mix the cocaine, but simply opened foil packets and snorted it. The Government introduced a spoon and strainer with traces of cocaine present. The laboratory report showed traces of cocaine. But no laboratory report was introduced to prove the presence of heroin.

Over objection and after denying a mistrial the Court charged the jury that the presence of heroin or cocaine would be sufficient to convict and that there would be no significance attached to a finding that only cocaine was present (T. pg. 1144-1145).

The Court essentially amended the indictment and did so in such manner as to broaden or expand the charges.

Mr. Justice Black, in delivering the opinion of the Court, in Stirone v. United States, 361 US 212, 4 L ed 2d 252, found that an amendment of the grand jury indictment was a "deprivation of such a basic right..." that it was "...far too serious to be treated as nothing more than a variance and then dismissed as harmless error." (page 217) That right is the substantial right to be tried only on charges presented in an indictment returned by a grand jury.

Mr. Justice Black relied upon an 1887 decision in Ex Parte Bain, 121 US 1. The Court in Bain (quoted in Stirone at 216-217) stated:

"If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggest changes, the great importance which the common law attached to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed."
121 US 1,10.

The Court went on to hold in Bain:

"that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected *by the constitutional provision, at the mercy or control of the court or prosecuting attorney" 121 US 1,13.

The Bain Case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See also United States v. Norris, 281 US 619, 622, 74 L ed 1076, 1077 50 S ct 424. Cf Clyatt v. United States, 197 US 207,

219, 220, 49 L ed 726, 730, 731, 25 S ct 429.

Mr. Justice Black in commenting on the court's action, stated precisely, at 217:

"Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous."

The import of the statutory language visa vie the evidence presented could not allow a verdict on cocaine in the case at bar. The grand jury heard evidence of heroin- the prosecutor opened to the jury on the heroin packaging. Cocaine was not part of the theory of the case.

In Russell v. United States, 369 US 749, 8 L ed 2d 240, the Supreme Court reaffirmed its decision in Bain and Stirone. The court at pages 764-765 stated:

"What the subject actually was, therefore, is central to every prosecution under the statute, Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.

'It is an elementary principal of criminal pleading, that where the definition of an offense, whether it be at common law or be statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, - it must descend to particulars.' ' United States v. Cruikshank, 92 Us 542, 558, 23 L ed 588, 593. An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.' United States v. Simmons, 96 US 360, 362, 24 L ed 819, 820. 'In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished;. . . . ' United States v. Carll, 105 US 611, 612, 26 L ed 1135. 'Undoubtedly used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.' United States v. Hess, 124 US 483, 487, 31 L ed 516, 518, 8 S ct 571"

In Russell (at page 770) the court clearly
stated:

"This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended

except by resubmission to the grand jury, unless the change is merely a matter of form."

The Circuit Courts of Appeal have followed the mandate of the Supreme Court. In United States v. Cioffi, 487 F 2d 492 (2 Cir. 1973) this court at 499 reversed a conviction on other grounds while stating:

".....it appears settled that indictments worded in the conjunctive, charging violations of statutes worded in the disjunctive, can be supported by proof of either of the conjoined means of violating the act."

In the instant case the statute and the indictment were worded in the disjunctive with the intent of charging separate violations. A Schedule I substance can not be supported by proof of a Schedule II substance.

More recently, in United States v. Smolar, 557 F 2d 13 (1st Cir. 1977) that court reversed convictions obtained wherein the court in its instruction on the law varied from the charge in the indictment. The court found that the court "... materially altered the theory of criminal liability set forth in the indictment..." and that "...it cannot be said that the indictment sufficiently apprised appellants of the nature of the charges against them." (page 19).

Rose Smith was in the same position when the court amended the indictment over counsels objection.

In United States v. Ortiz, 324 F. Supp. 417 (1971) Judge Tenney closely followed the theory of Bain, Stirone and its progeny. This court should not vary from that theory of law to sustain a conviction and prison sentence predicated upon a significant amendment of the charge brought by the grand jury.

CONCLUSION

THE CONVICTION SHOULD BE REVERSED
AND THE INDICTMENT DISMISSED.

Respectfully submitted,

MICHAEL S. WASHOR

WASHOR

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 10 day of Jan. 19 78 at No. 1 St. Andrews NYC

deponent served the within *BRIEF*
upon U.S. Attorney, Sot. Dist. of NY

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
10 day of Jan. 1978

Edward Bailey
Edward Bailey

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

